

implementing Section 271(e)(1) in order to settle some of the issues that the BOCs have raised with respect to interexchange carrier (IXC) joint marketing.³ As will be explained below, this is another clear example of a baseless claim under Section 271(e)(1) that can only be intended to preserve the BOCs' local exchange monopoly. It is therefore extremely important that the Amended Complaint be dismissed quickly in order to discourage the filing of any more frivolous complaints raising nonexistent issues under the rubric of Section 271(e)(1).

The Amended Complaint

In its Amended Complaint, Ameritech focuses on an advertisement, attached as Exhibit 1 to the Amended Complaint, that MCI ran in newspapers in three cities -- Chicago, Detroit and Cleveland. The advertisement contains an illustration of a bill listing various services, including local and long distance services. Above the illustration, the ad states: "Only one bill. Only from one telecommunications company." Below the illustration appears the caption "Complete Telecommunications Bundling. Only from MCI." The ad then states, in part, that

only MCI can offer larger businesses a bill with all of their company's communications services on it. With volume discounts based on total spending. One contract and one contact, always at your service. Even the ability to know exactly what each one of your offices is spending.

³ See Public Notice, Pleading Cycle Established for Comments on MCI Petition for Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(e)(1) of the Act, CC Docket No. 96-149, DA 97-1003 (released May 9, 1997).

(Emphasis added). The Amended Complaint notes that this advertisement first ran on April 7, 1997. According to the attached affidavit of Frank Nigro, it was run in its original form three more times in each of the three cities. The final run of the advertisement in each city was on April 28.

Ameritech alleges that MCI provides local exchange service on a resale basis in Chicago and Detroit and intends to provide local service on a resale basis in Cleveland, and that this advertisement therefore violates the restriction in Section 271(e)(1) against the joint marketing of interLATA and resold local exchange services by a carrier serving more than five percent of the nation's presubscribed access lines. Ameritech notes that while MCI has some local exchange facilities in those three cities, it lacks such facilities in portions of those cities and surrounding suburbs and asserts that the advertisement did not contain any warnings or disclaimers indicating that the one-stop shopping and bundled discounts it mentioned were not available to all customers of MCI's local service. Ameritech requests that the Commission hold MCI liable for violating Section 271(e)(1), order MCI to cease and desist from any further violations and require MCI to pay damages. MCI served and filed its Answer on June 2, 1997 denying Ameritech's claim and interposing the affirmative defenses of failure to state a claim and that Ameritech's claim is precluded by the First Amendment.

The Amended Complaint Fails to State a Claim

Although Ameritech carefully skirts the real issue in its Amended Complaint, it is clear that, in light of all of the relevant facts, MCI has not violated Section 271(e)(1). That provision states, in part,

Until a Bell operating company is authorized ... to provide interLATA services in an in-region State, or until 36 months have passed since [February 8, 1996], whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.⁴

For purposes of this motion, the crucial phrase in this provision is "obtained from such company pursuant to section 251(c)(4)," the provision dealing with the purchase of BOC local exchange service for resale. As the Commission stated, in construing Section 271(e)(1) in the Non-Accounting Safeguards Order,⁵ local exchange service provided via the purchase of unbundled network elements pursuant to Section 251(c)(3) of the Act or over an IXC's own facilities is not covered by the restriction in Section 271(e)(1).⁶ Ameritech overlooks this

⁴ 47 U.S.C. § 271(e)(1).

⁵ First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (rel. December 24, 1996) (Non-Accounting Safeguards Order), petitions for recon. pending, appeal pending sub nom. SBC Communications, Inc. v FCC, No. 97-1118 (D.C. Cir. filed March 5, 1997).

⁶ Id. at ¶ 272.

distinction when it incorrectly asserts, as a matter of law, that "MCI is prohibited from stating or implying to customers ... that it may offer them bundled packages of interLATA and local exchange services or that it can provide them both services through a single transaction."⁷ It is only joint marketing of interLATA and resold local exchange services that is prohibited.

Accordingly, the challenged advertisement does not constitute prohibited joint marketing, since before, during and after the period that it was appearing in newspapers in the three cities, MCI was, and is, offering local exchange service to business customers solely via its own facilities. It did not then, and does not now, provide any local service on a resale basis to business customers in those three cities.⁸ Since the ad was explicitly aimed only at "larger businesses," especially those with more than one location, it did not, and could not, constitute the joint marketing prohibited by Section 271(e)(1). The Amended Complaint therefore fails to state a claim under the Communications Act upon which any relief may be granted.

Ameritech apparently believes that because MCI provides some local services by reselling Ameritech local service to some customers in the three cities, or at least intends to do so, it is somehow prohibited from jointly advertising interLATA and facilities-based local services there solely to other customers.

⁷ Amended Complaint at ¶ 20. Ameritech makes the same misstatement of law in ¶ 21 of the Amended Complaint.

⁸ Nigro Aff. at ¶ 4.

Ameritech's implicit "contamination" theory is not consistent with Section 271(e)(1) or the Non-Accounting Safeguards Order, however. As the Commission explained in that order:

In the advertising context, the Supreme Court has held that the First Amendment protects "the dissemination of truthful and nonmisleading commercial messages about lawful products and services." We must be careful, therefore, not to construe section 271(e) as imposing an advertising restriction that is overly broad. The fact that section 271(e) permits a covered interexchange carrier to ... offer and market jointly interLATA services and local services provided through means other than BOC resold local services (e.g., ... over its own facilities ...) makes the task of crafting an effective advertising restriction particularly difficult. For example, we see no lawful basis for restricting a covered interexchange carrier's right to advertise a combined offering of local and long distance services, if it provides local service through means other than reselling BOC local exchange service. ... [S]uch advertisements would be truthful statements about lawful activities.⁹

Thus, since MCI provides local service to larger businesses in the three cities at issue only "through means other than reselling BOC local exchange service," there is "no lawful basis for restricting [MCI's] right to advertise a combined offering of local and long distance services." This prior Commission interpretation of Section 271(e)(1) is determinative and requires dismissal of Ameritech's Amended Complaint.

Conclusion

Ameritech's attempt to enforce a joint marketing restriction


⁹ Non-Accounting Safeguards Order at ¶ 279 (emphasis in original).

that does not exist should be rejected. In order to prevent any further stifling of competitive marketing and the inevitable chilling of protected speech resulting from multiple frivolous complaints such as this one, the Commission should immediately dismiss this Amended Complaint.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By:


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Its Attorneys

Dated: June 13, 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AMERITECH CORPORATION,)	
)	
Complainant,)	
)	
v.)	File No. E-97-17
)	
MCI TELECOMMUNICATIONS CORPORATION,)	
)	
Defendant.)	

AFFIDAVIT OF FRANK NIGRO

I, Frank Nigro, being duly sworn, depose and state as follows:

1. I am Director, Local Product Management, for Business Markets at MCI Telecommunications Corporation (MCI). In that position, I manage the marketing of MCI's facilities-based and resale-based local exchange services to business customers, and I have a detailed knowledge of MCI's provision of local exchange services in Ameritech territory and the marketing of such services.

2. This affidavit is submitted in support of MCI's motion for summary judgment dismissing the above-captioned complaint alleging a violation of Section 271(e)(1) of the Communications Act arising from the running of an advertisement in three cities in Ameritech territory.

3. The advertisement, a copy of which is attached as Exhibit 1 to the Ameritech Amended Complaint, contains an illustration of a bill listing various services, including local and long distance services. Above the illustration, the ad states: "Only one bill. Only from one telecommunications company." Below the illustration appears the caption "Complete Telecommunications Bundling. Only from MCI." The ad then states, in part, that

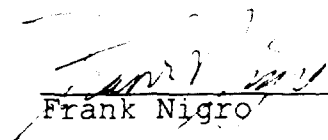
only MCI can offer larger businesses a bill with all of their company's communications services on it. With volume discounts based on total spending. One contract and one contact, always at your service. Even the ability to know exactly what each one of your offices is spending.

This advertisement first ran on April 7, 1997 in newspapers in Chicago, Detroit and Cleveland and was run in its original form three more times in each of the three cities. The final run of the advertisement in each city was on April 28.

4. For almost a year before the challenged advertisement first ran, during the entire period that it was appearing in newspapers in the three cities, and to this day, MCI was, and is, offering local exchange service to business customers in Ameritech territory solely via its own facilities. It did not then, and does not now, provide any local service on a resale basis to business customers in those three cities or anywhere else in Ameritech territory. The advertisement was deliberately and explicitly aimed exclusively at "larger businesses," especially those with more than one location. The only local

services that were marketed by the advertisement were therefore local services that MCI provided using its own facilities.

I hereby swear, under penalty of perjury, that the foregoing is true and correct, to the best of my knowledge and belief.



Frank Nigro

Subscribed and sworn to before me this 12th day of June, 1997.



Notary Public

My commission expires 2/20/98.

CERTIFICATE OF SERVICE

I, Sylvia Chukwuocha, do hereby certify that the foregoing "REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION" was served this 24th day of June, 1997, by hand delivery or first-class mail, postage prepaid, upon each of the following persons:

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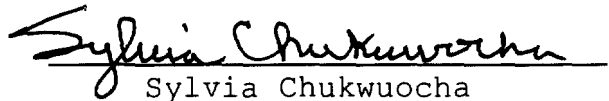
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